THE UNIFORM PARTNERSHIP ACT — A REPLY TO MR. CRANE'S CRITICISM[1]

MR. JUDSON A. CRANE has written in the June number of the HARVARD LAW REVIEW an article entitled "The Uniform Partnership Act — A Criticism."[2] This Act was approved by the Conference of Commissioners on Uniform State Laws on October 14, 1914. It has already been adopted in Pennsylvania and Wisconsin. Mr. Crane makes the following criticisms of the Act:

First. That it is not drawn on the theory that a partnership is a legal person.

Second. That though the intention of the draftsmen was apparently to proceed on the aggregate theory, the Act does not explicitly adopt either the entity or the aggregate theory of the nature of a partnership.

Third. That there is no section on Fraudulent Conveyances.

Fourth. That certain sections of the Act, which he indicates, are defective.

The writer will here discuss these criticisms in the order given; and first:

THE NATURE OF A PARTNERSHIP

Sec. 6 (1) of the Act defines a partnership as "An association of two or more persons to carry on as co-owners a business for profit." This definition is not in accord with the idea of those who believe that a partnership should be regarded as an entity endowed with a legal personality distinct from the legal personalities of the partners. Mr. Crane admits that the theory which makes the partnership a legal person is not the theory of our common law.[3] Though he strongly condemns the commissioners for not drafting the Act on the theory that a partnership is a legal person, he does not state in his article his reasons for believing in the theory, nor

[1] Limitation of space has made it impossible to treat in this article of the advantages resulting from the general adoption of the Act. I have set forth these "advantages" as they appear to me in an article in the Yale Law Journal for last June, entitled "The Uniform Partnership Act," 24 YALE L. J. 617.

[2] 28 HARV. L. REV. 762.

[3] 28 HARV. L. REV. 766, n. 35.

tell us why they should have discarded the aggregate theory which is the one on which our courts have generally proceeded. He does, however, make three statements, which he supports either by the citation of authorities or legal rules, from which he concludes that courts have been consciously or unconsciously tending toward the legal-person theory, while legislators, dealing with a partnership incidentally, treat it as a legal person.

The fundamental importance of a correct theory of the nature of a partnership to all partnership law warrants, before specifically discussing these statements and conclusion, as full a discussion of the subject as the necessary limits of space allotted to this article will permit.

In the first place the reader anxious to determine for himself whether the Uniform Law Commissioners made a mistake in not incorporating in the Act the theory that a partnership is a legal person, should see clearly the question at issue. He is also entitled to have called to his attention the reasons which induced the commissioners, after first directing their Committee on Commercial Law to draft the Act on the theory that a partnership is a legal person, to return to the dominant theory of our common law; a final determination made on the unanimous advice of the group of writers, teachers, and other experts on partnership law called by the Committee on Commercial Law to discuss the very question raised by Mr. Crane — the legal theory of the nature of a partnership to be adopted by the draftsmen of the Act.

It will perhaps tend to clarify the question at issue if reference is made to certain things on which there can be general agreement.

A business is a series of acts directed in a certain manner toward a definite end. We say that A. and B. are in partnership as dry goods commission merchants, by which we mean that they have associated themselves together to obtain a profit by selling the goods of a certain class of manufacturers on commission. As with any other partnership, A. and B. in association have a group of activities distinct from their other activities. A. may also be engaged in other businesses by himself or with others; so also may B.; while in any event each carries on activities which form no part of their mutual business as dry goods commission merchants. Or one man may, without associating himself with others, carry on by himself one or several distinct businesses. Engaged, for in-

stance, in running a hotel and livery stable, he may run them as one business or two. It is largely a question of how he wants to keep his books, and how he organizes his force of employees.

The way in which men's activities are grouped when they act by themselves or with others is a question of fact, not law. When two or more persons join in carrying on a business, as a matter of practical necessity they are obliged to keep their activities in the business distinct from those activities which are not intended to further their mutual enterprise. Their mutual activities they may keep as one or divide into two or more groups. Thus A. and B. may form a partnership to run a hotel and a partnership to conduct, as a separate business, a steamboat line; or two partners in the retail grocery business may use their delivery wagon on Sunday to take their families on a pleasure excursion, or may, apart from their business, mutually engage in a real estate speculation.

The reasons which induce a man to group his activities are infinite. Often the grouping is imperative. A man engaged in the hotel and garage business may, as his real or supposed convenience dictates, run them as one business or two. On the other hand, the trustee of an estate must, if he obeys the law, group apart from all his other activities his activities as trustee.

Once a man so far separates his activities in a given direction as to think and speak of them as being performed in a distinct business, he can regard himself as having relations with that business, and he can think of the "business" as possessing rights and having obligations. Thus he can and does speak of property as belonging to his business, or charge himself on the books of the business when he draws money for his personal use. Or the trustee, dealing with his business as trustee as distinct from all his other activities, may speak of the "property of the trust estate" or of the "estate" as owing him money for advances. In the same way, when two or more persons associate themselves in business as partners, they may properly speak of the partnership property, and of themselves as indebted to or as being owed by the partnership. The language is appropriate, because the separate grouping of the activities mutually carried on toward a definite end is a fact, just as the separate grouping of the activities of a man as a trustee of an estate is a fact.

The illustrations just given show that any group of activities,

whether carried on by one person or many, by the very fact that the activities are grouped becomes an entity. For the best, indeed perhaps the only practical definition of an entity, is — phenomena grouped in the mind as possessing a common attribute not had by other phenomena. Thus a business regarded by the owner or owners as distinct from all their other activities is an entity, because all the acts done in it — that is, all the phenomena of the group — have this in common, that they are performed or directed by the owner or owners of the business to obtain, in a given manner, a profit.

Just as it is true that man can and does as a matter of fact create entities by dividing his activities into groups, so it is also true that one man — barring certain rare abnormal instances of dual personality — has but one personality. Indeed this concept of the oneness of personality is bound up in our concept of a man. The trustee and the same man conducting his private business has one and the same personality. Because he carries on two businesses he does not thereby become two persons. Men who associate themselves to carry on a business in partnership, and who so carry it on, do not create a personality distinct from their own separate personalities.

That man groups his activities — must indeed group them — and that normally one man has one personality, and that a group personality distinct from the personalities of the individuals forming the group is a figment of the imagination, are facts, not legal theories.[4] On the other hand, it is necessary that the law should have a theory of legal personality. The law may take the position that one person in fact can have but one legal personality, or that he may have many: a separate legal personality for every separate group of his activities, for each business he conducts as a distinct business, for domestic concerns, and for each separate trust. The legal theory that a man is one legal person, even though he may engage in several distinct lines of activity, has this in its

[4] Dr. Otto Gierke, the eminent German jurist, affirms that group consciousness, or group personality distinct from the separate consciousness or personalities of the individual members of the group, does in fact exist. See Die Genossenschaftstheorie und die Deutsche Rechtsprechung, Kapitel II, 141. In this country, as far as the writer is aware, all advocates of the legal-person theory of partnership admit that a group personality is no more a reality than a composite picture is a picture of a real person.

favor — the theory corresponds to the facts. The theory that one person may possess a dual legal personality, or the theory that a group of persons may possess a legal personality distinct from the legal personalities of the members of the group, are based on the assumption that one man acting in two capacities is two persons, not one person. This assumption does not correspond to fact. It is a legal fiction and, like other legal fictions, should not be resorted to unless it can be shown that justice cannot be done without the adoption of the fiction.

From what has been said it will be seen that the issue between Mr. Crane and the Commissioners on Uniform State Laws is not whether a partnership is or is not an entity. It is an entity, because the activities of the partners as partners are separate from their other activities. The issue is whether the group of activities carried on by the partners should be regarded as being carried on by them — which is the actual fact — or as being carried on by a legal personality distinct from the legal personalities of the partners. Thus under the aggregate theory the partners own in common the partnership property, and they are all joint principals in partnership transactions. Under the legal-person theory the partnership legal person owns the partnership property, and the partners are merely its agents.

This being the issue, the reasons which led the commissioners to decide in favor of the theory on which the present Uniform Partnership Act is drawn will be briefly stated.

When the commissioners first decided to draft a Partnership Act they directed their Committee on Commercial Law to draft the act on the theory that a partnership is a legal person. The main reason for this direction is not mentioned by Mr. Crane, though at the time it apparently formed an overwhelming argument in favor of the theory. There exists in the common law an almost hopeless confusion, both in theory and practice, on all questions connected with the rights of a partner and the separate creditors of a partner in partnership property.[5] The common law started

[5] Compare, for instance, the following cases: Heydon *v.* Heydon, 1 Salk. 392 (1693); Eddie *v.* Davidson, Douglas 627 (1781); Taylor *v.* Fields, 4 Ves. Jr. 396 (1799); Doner *v.* Stauffer, 1 P. & W. (Pa.) 198 (1829); Phillips *v.* Cook, 24 Wend. (N. Y.) 388 (1840); Washburn *v.* Bank of Bellows Falls, 19 Vt. 278 (1847); Nixon *v.* Nash, 12 Oh. St. 647 (1861); Menagh *v.* Whitwell, 52 N. Y. 146 (1873); Case *v.* Beauregard, 99 U. S. 119 (1878); Harney *v.* First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221 (1894).

with the proposition, in substance enunciated by Lord Holt in the celebrated case of *Heydon* v. *Heydon*,[6] that partners are co-owners of partnership property holding as joint tenants. If the partners are joint tenants, then all the legal incidents of joint tenancy apply. The separate creditor of the partner can levy on partnership property. The sheriff can sell the partner's interest and deliver the goods to the purchaser. The purchaser becomes tenant in common with the remaining partners. While the purchaser cannot dispose of the interests of the remaining partners in the property, he can retain possession of the property. All this is what happened in the case referred to. Now each partner, by recognizing the existence of a common fund for the purposes of the business, impliedly agrees with his partners not to touch that fund for his own separate purposes until all obligations incurred in their mutual enterprise are satisfied. Therefore, the results of regarding the partners as co-owners of partnership property holding as joint tenants are that the separate creditor of the partner has rights over partnership property which his judgment debtor does not have; he can take possession of the property for a non-partnership purpose, and he can assign the partner's right in the specific partnership property for a non-partnership purpose. These results are manifestly unfair to the other partners, and various devices have been resorted to in different jurisdictions to avoid them. All these devices have one object: to keep the partnership property intact until the partnership creditors are paid and the other partners receive their shares in the partnership property. In spite of the efforts of the courts of equity and common law toward this end, as well as much tinkering with the subject by the legislature, the confusion of theory and practice is still so great as to produce in many states real injustice.[7]

[6] 1 Salk. 392 (1693).

[7] Thus, in Pennsylvania, prior to the adoption of the Uniform Act, the sheriff, at the instance of the separate judgment creditor of the partner, would levy on the debtor partner's interest in the specific partnership property attached, and sell this "interest," the purchaser having a right to a bill in equity to obtain, not what the sheriff had sold, which was the debtor partner's interest in specific partnership property, but the debtor partner's interest in the business of the partnership. See ACT of April 8, 1873, PEPPER & LEWIS DIG. OF LAWS, 5620. Besides its inconsistency, the practical injustice resulting from this procedure was that it required a sale of the debtor partner's interest in the partnership before an account was had to ascertain the value of the interest. Possible purchasers, being offered something whose value

While the majority of the recorded cases discuss the rights of the creditor of the separate partner, or in other words the involuntary assignment of the partner's rights in specific partnership property, a similar confusion exists in the language employed by the courts in the comparatively few cases to be found in the books, which discuss the right of the assignee of the partner where the assignment has been a voluntary act on the part of the partner.[8] A Partnership Act which did not end these confusions, and provide the law with a clear and practically satisfactory statement of the rights of a partner in specific partnership property, would fail in its main purpose.

In 1902, when the commissioners determined to draft a Partnership Act, the confusion which exists in our case law in respect to the rights of a partner in specific partnership property was manifest. It was also equally manifest that the legal-person theory of a partnership avoids this confusion, besides giving to the assignee of a partner, and the separate creditor of a partner, the rights, and no more than the rights, to which they are respectively entitled. If a partnership is a legal person, a separate creditor of a partner cannot levy on partnership property. He may, however, by a bill in equity, or by garnishee proceedings, attach the interest of the partner in the partnership. Again, under that theory, while the assignee of a partner's interest in the partnership does not obtain any right to partnership property, he does secure the beneficial interest of the assigning partner in the partnership business. Since avoiding the confusion in respect to the rights of the partners in specific partnership property was the chief concern of the commissioners, it is not to be wondered at that it was not difficult to convince them that they should instruct their committee and its draftsman, the late Dean Ames, to draw the Act on the theory that a partnership is a legal person.

In the two drafts submitted by Dean Ames, he defined a part-

was highly speculative, usually refused to bid, with the result that the interest was bought in by the judgment creditor.

[8] Compare Cayton *v.* Hardy, 27 Mo. 536 (1858); Drake *v.* Thyng, 37 Ark. 228 (1881); Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966 (1884); Osborne *v.* Barge, 29 Fed. 725 (Circ. Ct. N. D. Ia. 1887); McNair *v.* Wilcox, 121 Pa. St. 437, 15 Atl. 575 (1888); Freeman *v.* Abramson, 30 Misc. 101, 61 N. Y. Supp. 839 (1899), with Blaker *v.* Sands, 29 Kan. 551 (1883); Arnold *v.* Stevenson, 2 Nev. 234 (1866); Sutlive *v.* Jones, 61 Ga. 676 (1878).

nership as "a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit." [9] These drafts were not fully discussed, because of the objection that the constitutions of some states made a legal but non-natural person a corporation. The commissioners, however, finally determined to proceed with the attempt to draft the Act on the legal-person theory, apparently taking the position that this constitutional objection could be overcome, or at least would not prevent the adoption of the Act in more than a few states.

On Dean Ames' death the task of preparing a draft act on the legal-person theory of partnership devolved on the writer. He found that his first problem was to determine the relation of the partners and the persons having claims on the partnership. For instance, in a partnership contract, are the partners parties to that contract or are they sureties or guarantors, or have they only a contract with the partnership to supply the partnership with sufficient funds to meet any obligation arising out of the contract? Again, suppose one of the partners in carrying on the partnership business injures a third person, have the other partners any direct liability to the person injured, or is the only obligation of the partners an obligation to the partnership to supply it with sufficient funds to meet the liability arising out of the injury?

In preparing the draft the writer was obliged to discard the idea that the partners were co-principals with the partnership in all partnership transactions. The whole idea leading to the adoption of the theory is that the partnership, not the partners, is carrying on the business. If the partners must still be regarded as co-principals it may well be asked: are not the problems of partnership sufficiently complicated without creating another person who must be regarded as participating in all partnership acts, and be made with the partners a party in all actions arising out of partnership transactions? It was also impracticable to regard the partners as merely sureties on all partnership contracts, declaring their liability with the partnership to be joint or joint and several, or to regard the partners as guarantors, because either of these solutions left the liability of the partners for partnership torts still to be provided. He was impelled, therefore, to conclude

[9] First and Second Draft, Sec. 1.

that the only practical solution under the legal-person theory was the one to which all of the advocates of that theory to whom he has talked adhere — namely, that the partner should be regarded as a contributor to the partnership and as having an obligation to the partnership to furnish it with the necessary funds to meet its obligations to third persons, but that those having claims against the partnership have, as such claimants, no claims against the partners. In these conclusions he followed Dean Ames, who, in his two drafts, also regarded the partners as "contributors to the firm" and apparently without direct liability for partnership obligations.[10] No sooner had the relations, under the legal-person theory, of the legal person, the partners, and the partnership creditors been made plain, than the practical difficulties of the theory became apparent. Under the legal-person theory, unless we are willing without apparent object to still further complicate all questions by making the fictitious legal person a co-principal with the partners in all partnership transactions, creditors of the partnership are not creditors of the partners. A judgment against the partnership is not a judgment against any partner, and the judgment creditor cannot levy on the separate property of a partner; he must first exhaust partnership property, and then attach the claims of the partnership against the partners as contributors by new legal or equitable proceedings. And it is proper to emphasize here that to adopt the legal-person theory changes existing law in a matter of vital importance, because the theory itself is based on an assumption false in fact, namely, that third persons dealing with a partnership do not deal directly with the partners as principals. They do. Partnership creditors are not persons who have trusted primarily a partnership fund of the sufficiency of which the partners are guarantors; they have trusted the partners as individuals with the reputation of possessing property and conducting a successful business. The relative amount of the property held in joint or separate ownership is not taken into consideration. To say that business men dealing with a partnership trust primarily the joint property of the partners, and secondarily their separate

[10] In both his drafts he required the firm to be sued in the firm name. (See First Draft, Sec. 5 (4); Second Draft, Sec. 4 (4)). The judgment creditor had to exhaust firm assets before obtaining the right by legal or equitable process to levy on separate property.

property, is to make a statement which every person who has ever been called upon to advise in transactions with partnerships knows to be false.

When the writer perceived these inevitable results of the legal-person theory and recognized that the theory was, in last analysis, based on an assumption which did not accord with business practice, he felt, as he still feels, that the Commissioners on Uniform Laws would never adopt a partnership act on the legal-person theory of partnership and that they should not do so. He believes that if the difficulties and confusions of our existing partnership law cannot be solved without the adoption of a theory which leads to such results, it would be better not to have any act.

Another, though minor difficulty, encountered in drafting an act on the legal-person theory of partnership was the necessity, or rather great desirability, under that theory, of some efficient system for the registration of all partnerships. If a partnership is a legal person it should only be sued under its name.[11] To ascertain beyond possibility of dispute what that name is, every partnership doing business in the state should register its name in a public office.[12] To enforce this requirement some penalty for its violation is necessary. The only practical penalty is the provision that until registration the partnership cannot maintain any action. Entirely apart from the fact that the sanction is only partly effective, as an unregistered partnership could nevertheless maintain a suit in the federal courts,[13] and also apart from the practical difficulty arising out of the dislike in this country of registration systems for business associations, unless the necessity is clearly demonstrated, the whole idea that all common-law partnerships should be registered is based on the assumption that partners always know, or ought to know, that they have formed a partnership. This is another assumption that does not correspond to fact. Persons who form a business association in which they are co-owners of the business form a partnership, unless they organize under a statute providing for a special kind of association. Ownership involves control. It is impossible to state that this or that

[11] Dean Ames' drafts contain an express provision to this effect. First Draft, Sec. 5 (4); Second Draft, Sec. 4 (4).

[12] First Draft, Sec. 6; Second Draft, Sec. 5.

[13] *In re* Farmers' Supply Co., 170 Fed. 502 (1909).

power makes the man who possesses it an owner or co-owner of a business. Any one of an infinite variety of combinations of fact shows an ownership of a business. Again, no matter how many times courts pass on the question of whether under the facts presented a partnership has been formed, new cases will constantly arise in which, though the contract between persons alleged to be partners is known, it will nevertheless be impossible to say positively whether the courts will or will not declare that the contract makes the parties to it partners. A hundred and fifty years of recorded litigation in our courts should be sufficient to convince anyone that in many cases it is not practicable to determine without a court decision whether a partnership has been formed or not.[14] A. may make a contract with B. which will give A. so much control over B.'s business as to make the business A. and B.'s, and A. and B. partners, although neither A. nor B. intended A. to become unlimitedly liable for the debts of the business or knew that he was a partner until a court so decide. Again, two or more persons may form a common-law partnership, though they believe they have formed another kind of business association because they have failed to comply with the requirements of the statute under which the other kind of association must be organized.[15]

At present the cases in which the question of partnership or no partnership is presented, are those in which the person who has dealt with what he alleges to be a partnership is trying to hold someone liable for the debts of a business who denies that he is a partner. The question is raised in order that justice may be done to the creditors of a business. If, however, we should adopt the legal-person theory of partnership, and as a consequence require all partnerships to be registered and each partner to sign the registration certificate, the question whether a partnership did or

[14] The interested reader who desires to convince himself of the practical difficulty of determining in many cases whether a partnership does or does not exist should read: Grace *v.* Smith, 2 Wm. Bl. 998 (1776); Waugh *v.* Carver, 2 H. Bl. 235 (1793); Wilkinson *v.* Frasier, 4 Esp. 182 (1802); Dunham *v.* Rogers, 1 Pa. St. 255 (1845); Holmes *v.* Old Colony R. R. Co., 5 Gray (Mass.) 58 (1855); Mollwo, March & Co. *v.* Court of Wards, L. R. 4 P. C. 419 (1872); Eastman *v.* Clark, 53 N. H. 276 (1872); Pooley *v.* Driver, L. R. 5 Ch. Div. 458 (1876); Hart *v.* Kelley, 83 Pa. St. 286 (1877); Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785 (1881); Hackett *v.* Stanley, 115 N. Y. 625, 22 N. E. 745 (1889); Estabrook *v.* Woods, 192 Mass. 499, 78 N. E. 538 (1906).

[15] Fourth Street Nat. Bank *v.* Whitaker, 170 Pa. St. 297, 33 Atl. 100 (1895); McLennan *v.* Hopkins, 2 Kan. App. 260, 41 Pac. 1061 (1895).

did not exist could be raised by many defendants to delay just claims. For example: A. and B. have a contract in regard to what both regard as A.'s business. Under this contract it is doubtful whether they are or are not partners. A., in carrying on the business, enters into a contract with C. by which C. is obligated to pay a certain sum. C. refuses to pay and A. brings suit. C. could defend on the technical ground that A. and B. are partners carrying on business under the name of A., that the obligation is a partnership obligation, and that the partnership is not registered. The case could not proceed until this doubtful and often most difficult question is determined, and if it is determined that a partnership exists, there will be still further delay, at least until the formalities of registration are complied with.[16]

Again, to require the names of all partners to be registered before the partnership is allowed to begin or maintain an action, as is done by the advocates of the legal-person theory,[17] assumes that partners who allow one of their number to be secret and inactive — that is dormant — are acting wrongfully and should be punished. To regard the dormant partner as a wrongdoer and his partners as wrongdoers, makes a radical change in the law. So far is existing law from regarding the dormant partner as a wrongdoer that an exception is made in his favor; he is not held liable for contracts made in the partnership name after his retirement, although no notice of dissolution has been published. It is submitted that the attitude of our common law toward the undisclosed principal generally, of which its attitude toward the dormant partner is an example, is sound. By remaining dormant he has not deceived others to their disadvantage. The active partner or partners have declared that they will be liable for the performance of the contracts, and they are liable. If another principal is discovered, he also can be held liable; not because he has deceived anyone by remaining dormant, but because he is an

[16] In the drafts submitted to the Commissioners on Uniform State Laws by Dean Ames, he provided that no suit could be "begun or maintained" until the registration requirements were complied with. This apparently would require a new suit to be brought in the supposititious case given in the text if the court should hold that A. and B. were partners. Had the word "begun" been omitted, thus prohibiting merely the maintaining of a suit by an unregistered partnership, registration would apparently remove the bar to the continuance of the suit.

[17] First Draft, Sec. 6 (5); Second Draft, Sec. 5 (5).

owner of the business in the carrying on of which the contract was made.

In view of the impractical and unjust effect on the rights of partnership creditors to which the legal-person theory inevitably leads us, as well as the minor difficulties in respect to the establishment of an efficient system of partnership registration to which reference has been made, the writer tried to ascertain if the difficulties and confusions which all admit exist in our present law could not be overcome without adopting that theory. These difficulties and confusions, as has been pointed out, largely center around the nature of a partner's rights in specific property. As we have seen, Lord Holt held in effect that partners were co-owners of partnership property, holding as joint tenants. It is evident that the first assumption is a fact. Partners are co-owners of partnership property. But why the legal theory that the incidents of this co-ownership are the incidents of joint tenancy? Joint tenancy is not the only form of co-ownership known to our law. Even at the time of Lord Holt, tenancy in common, joint tenancy, and co-parcenary, each with different legal incidents, were recognized forms of co-ownership. To use Hearn's definition, which Mr. Crane quotes: "Ownership is merely a collective term denoting the aggregate of several independent rights." [18] The kind of ownership is determined by the legal incidents or rights in relation to the property which the law recognizes as existing in the owner. There can be as many kinds of ownership, joint or several, as there are possible combinations of rights in relation to property. It is true that joint tenancy has the incident that on the death of one co-owner his rights of control pass to the surviving tenants, and it is also true that this legal incident is adapted to the practical needs of the situation which arises on the death of a partner. But nothing shows more clearly than the decision of Lord Holt that other legal incidents of joint tenancy are not adapted to partnership property. If applied, these other legal incidents produce great injustice. This is not to be wondered at, because each form of co-ownership known to our law had its origin in some economic, social, or political necessity. Joint tenancy, whatever its origin, did not arise out of the custom of persons combining their property to carry on a

[18] HEARN, LEGAL RIGHTS AND DUTIES, 186.

business. It would, therefore, be an extraordinary coincidence if the legal incidents of the tenancy were suited to the needs of the partnership relation. But if the law recognized the legal incidents of joint tenancy because those incidents were once adapted to the needs of some holders of land as co-owners, why should we not to-day give to partnership co-ownership the legal incidents which are adapted to the partnership relation? Or to state the question in the form of a proposition: Persons become co-owners of property as partners to further the ends of the partnership and the law should attach to their co-ownership legal incidents fitted to the partnership relation.

Acting on this principle the writer prepared a draft of a partnership act on the so-called aggregate or common-law theory of partnership, treating the partners, not as joint tenants, but as co-owners of the partnership property holding by a distinct tenancy which he called tenancy in partnership. To this tenancy in partnership he gave those legal incidents which seemed to correspond to the understanding of partners and promote partnership as a practical form of business organization. He then submitted the draft which he had drawn on the legal-person theory, and this other draft, to the Committee on Commercial Law of the Commission on Uniform State Laws, suggesting that the two drafts, as two distinct methods of meeting what were acknowledged as existing difficulties of our partnership law, be first referred by the committee to a conference of persons who could, because of special experience, be fairly called experts.[19] The committee adopted this suggestion and invited, besides lawyers in general practice known to have large experience in advising partnerships, all the writers on partnership in the United States, as well as the teachers of partnership in the leading law schools of the country, to meet with the committee in Philadelphia. The invitation was generally

[19] The two drafts, Drafts 3 and 4, are usually referred to in the Reports of the Conference of Commissioners of Uniform State Laws as Draft B, the one drawn on the legal-person theory, and Draft C, the one drawn on the theory thereafter adhered to in the subsequent drafts and which is embodied in the present Act. In the pamphlet in which these two drafts are printed there is also printed as Draft A the second or last draft submitted to the commissioners by Dean Ames. This second draft of the Act is sometimes referred to in the reports of the conference as Draft A. In preparing Drafts B and C the writer had the advantage of the assistance of Mr. James B. Lichtenberger of the Philadelphia bar.

accepted and the meeting was held in the spring of 1911. With one exception, all the teachers of partnership in our leading law schools were present, as well as all the prominent writers on the subject, besides several lawyers of large practice. The conference lasted two days.[20] At its conclusion those present unanimously recommended that the commissioners should draw the Act on the common-law or aggregate theory of partnership, treating the partners as holding partnership property by a peculiar tenancy to which should be given those legal incidents which now appear in the Uniform Act.

It is a significant fact that, with one exception, all those called to the conference had at one time believed that our law should adopt the legal-person theory of partnership.[21] Several came to the meeting still believing that the Act should be drawn on that theory. The change in opinion which made possible the unanimous vote in favor of the theory underlying the existing Uniform Act was, in the main, due to three causes:

First. The realization that to draft a partnership act on the legal-person theory of partnership was not to express in statutory form the law of partnership which had grown up in our courts, but in effect to abolish much of our existing partnership law and substitute in its place radically different legal principles affecting this important business association.

Second. The perception that the legal-person theory not only rests on the fiction of group personality, but also on an assumption that business men in dealing with a partnership do not consider themselves as dealing directly with the partners, an assumption which is directly contrary to the fact; together with the perception that there were unforeseen practical difficulties in working out under that theory the rights of the partnership creditors.

Third. The belief resulting from an examination and discussion of the draft prepared on the aggregate theory submitted, that the worst of existing difficulties and confusions in our partnership

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[20] To the best of the writer's recollection all, or practically all, the arguments in favor of the legal-person theory given by Mr. Crane in his article, as well as several others, were fully thrashed out to what seemed to those present a satisfactory conclusion.

[21] Mr. George Wharton Pepper of the Philadelphia bar.

law — the rights of partners in specific partnership property — could be overcome by getting rid of the idea that partners hold partnership property as joint tenants with modifications and giving to the co-ownership incidents which fit in with the objects leading business men to form partnerships.

It should also be added that those with the largest practical experience present were opposed to regarding the partnership as a "legal person" because of the effect of the theory in lessening the partner's sense of moral responsibility for partnership acts.

The Committee on Commercial Law reported the result of the special conference to the Conference of Commissioners. The discussion before the Conference was largely a repetition of that before the meeting of experts. Thereafter the commissioners proceeded on the theory of the present Act. In Section 25 the partners are stated to be co-owners of partnership property, holding as tenants in partnership. The legal incidents of this tenancy as set forth in the Act may be summed up as follows: A partner has a right to possess specific partnership property for a partnership purpose, and for a partnership purpose to assign his rights in it in connection with the assignment of the rights of his partners; but he has no right or even power to assign his rights in specific partnership property separately from the rights of his partners, and therefore his creditors have no power to levy on or sell such rights. On the death of a partner his rights in specific partnership property pass to the surviving partners — or if he is the last surviving partner, to his executor — and are not subject to dower, courtesy, or allowance to widows, heirs, or next of kin. It is submitted that these legal incidents correspond to the practical necessities of the partnership relation, and that with the straightening out of the chief confusion in our existing law of partnership — the rights of the partner in specific partnership property — the chief reason for the adoption of the legal-person theory disappears.

Mr. Crane does not deny that the difficulties heretofore surrounding a partner's rights in specific partnership property are solved by the Act as drafted. Indeed, in his second criticism, which is that the Act does not explicitly adopt either the aggregate or legal-person theory, he declares that Section 25, as well as other sections of the Act in which existing confusions are corrected, produces its

good results because its provisions show an adoption, though an unconscious adoption, of the legal-person theory.

Having stated the reason why the commissioners have embodied in the Uniform Act the prevalent common-law or aggregate theory of the nature of a partnership, let us examine the three arguments, or rather statements, advanced by Mr. Crane in his article tending to favor the legal-person theory. These are:

First. That while the majority of textwriters and courts proceed on the aggregate theory in dealing with many problems arising out of partnership transactions, courts have in numerous cases been forced to accept and apply the entity (legal-person) theory.[22]

Second. That there are decisions not expressly based on the entity (legal-person) view of the nature of the partnership, but not to be reconciled with any other view, and therefore unconsciously applying it.[23]

Third. That legislators having occasion to deal with the partnership incidentally, while legislating for some purpose other than that of codifying the law of partnership, naturally treat the partnership as a legal person, the subject of rights and duties like a natural person or corporation.[24]

From the first two propositions he concludes, that "the courts have been consciously or unconsciously tending toward the entity (legal-person) theory, and it is not unreasonable to expect that it may be eventually openly accepted and consistently applied, if courts are not hindered in so doing by legislation."

Whether the conclusion is warranted from any two or all of the statements is immaterial unless the statements themselves are warranted by the facts. In order to ascertain this the evidence in their support given by Mr. Crane must be examined.

The only evidence given in support of the first statement, that to solve many problems arising out of partnership transactions the courts have been forced to accept the legal-person theory, is the citation of a number of cases in which Mr. Crane says: "the courts for the purpose of reaching their decisions avowedly recognize the partnership as a legal person."[25] He does not give the

[22] 28 HARV. L. REV. 766. [23] *Ibid.*, p. 767. [24] *Ibid.*, p. 768.

[25] *Ibid.*, p. 766. He also cites a statement of Jessel, M.R., made in the course of his opinion in Pooley *v.* Driver, L. R. 5 Ch. Div. 458, 476 (1876): "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence

facts of the cases cited. When they are examined it is found that while the courts deciding the cases, in whole or in part, base their conclusion on the legal-person theory, the cases themselves fall into two classes: first, those in which the same conclusion as that arrived at by the court can also be reached under the aggregate theory as set forth in the provisions of the Uniform Act; and second, those in which the conclusion, due solely to the conscious adoption of the legal-person theory, is inequitable and unjust. The result of this analysis of the cases cited by Mr. Crane, if correct, not only destroys the statement in support of which they were cited, but is in itself a strong argument against regarding the partnership as an artificial legal person. The writer has, therefore, set forth in a note the facts of each case cited so as to enable the interested reader to judge for himself the correctness of his conclusions.[26]

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of the firm as a separate entity from the existence of the partners." Jessel himself explains the reason for his statement by saying: "If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity" (p. 476). In spite of a very proper and natural respect for the learned Master of the Rolls, it has doubtless occurred to many readers of his opinion, as it has to the writer, to ask "Why not?" Why is it necessary to invent a legal person for whom the partner may be agent, when the fact that a man acts for himself as principal and as agent for his partners as his co-principals naturally results in a joint obligation of all the partners?

[26] *Analysis of Cases Cited by Mr. Crane in Support of Statement that Courts in Dealing with Many Problems Arising Out of Partnership Transactions have been Forced to Accept and Apply the Legal-Person Theory of the Nature of a Partnership.*

Lacey *v.* Cowan, 162 Ala. 546, 50 So. 281 (1909). This was a bill in equity by the trustee in bankruptcy of a partner to obtain the proceeds of the sale by the partners of partnership property, which proceeds the complainant alleged had been fraudulently placed by the partners in the hands of the respondent. The court dismissed the bill for want of equity. The same result would be necessarily reached under the Uniform Act. A partner has no right to possess partnership property except for a partnership purpose (Sec. 25 (*2a*)). Therefore, the trustee in bankruptcy of one, but not all the partners, has no right to possess such partnership property for the purpose of using it to pay the separate debts of the partner. Again, he has no right to possess partnership property for the purpose of paying partnership creditors, because such use is in effect winding up the partnership and, while the bankruptcy of a partner dissolves the partnership (Sec. 31 (5)), the partners not bankrupt have a right to wind up partnership affairs (Sec. 37). If the other partners consented to the trustee's administering partnership property, nevertheless, under the legal-person theory there would be an insurmountable objection to his doing so. A trustee in bankruptcy is not able to administer the fund to which his bankrupt has no title for the purpose of paying debts which are not his bankrupt's debts. Under the aggregate theory and

Mr. Crane's second statement is that there are decisions not expressly based on the legal-person theory of partnership, but not

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the Uniform Act, however, the trustee with the consent of the other partners would be able to administer the partnership property for the purpose of paying partnership creditors, because partnership debts are under the Act the debts of the partners, and therefore the debts of the trustee's bankrupt. And it is submitted that there is no equitable reason why, with the consent of the other partners, partnership property should not be used by the trustee of the bankrupt partner to pay his debts to his partnership creditors.

Jones *v.* Bliss, 45 Ill. 143 (1867). A. and B. were partners. A. assigned all his interest to B., "including book accounts." One of the book accounts was a debt due by A. to the partnership. Held that B. could collect this debt from A. by a bill in equity. The only point at issue was the intent of the parties. By "book accounts," did they mean to include this account against A.? If they did, then A. had promised for a good consideration to pay B. the amount stated in the account, and if any technical objection existed to its collection at law, B. should be allowed to bring a bill in equity. It is submitted that so far from the legal-person theory of partnership being necessary to the decision, it only seems to confuse the issue which, as stated, is the intent of the parties. If a partner indebted to a partnership does not owe the debt to himself and partners acting for their common business enterprise, but owes a distinct "legal person," then "book accounts" of the partnership in this case necessarily include an account against a partner on the books. Thus the issue which should be decided by the real facts and intent of the parties is decided by the legal fiction of a separate partnership legal person. The case is only one of many, some of which are given in the text, by which the fiction of the legal person tends to foreclose a discussion on the real issue involved.

Johnson *v.* Shirley, 152 Ind. 453, 53 N. E. 459 (1899). A. and B. were partners engaged as merchants in the sale of hardware and implements. A. entered a chattel mortgage "upon his individual one half interest in the stock of hardware and implements." Held, that this mortgage did not attach to the partnership property, but only to A.'s interest in the surplus remaining after the payment of firm debts. The same result would have been reached under the Uniform Act. Section 25 (*2b*) provides that a partner's right in specific partnership property is not separately assignable. Section 26 declares that a partner's interest in the partnership is his share in the profits and surplus. This interest is assignable (Sec. 27). Both under the separate legal-person theory, as under the Uniform Act, the only debatable question in the case cited is whether A. did, by attempting to execute a mortgage on one half his interest in partnership property, in effect mortgage one half his interest in the partnership.

Lansing *v.* Bever Land Co., 158 Ia. 693, 138 N. W. 833 (1912). The Iowa Code, 1897, § 3468, provides: "Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought, against the members not made parties, on the original cause of action." A. and B. were partners. Suit was brought against the firm and judgment obtained. Execution on this judgment was levied on the separate properties of the partners. A bill in equity to cancel this levy was sustained. The case is thus one interpreting a local procedural statute. It will be, however, of interest to inquire whether the statute as worded is inconsistent with

to be reconciled with any other view, and therefore unconsciously applying it. In support of this statement he cites several legal

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the aggregate theory of partnership. It declares that a suit can be brought against the partners. This is unquestionably inconsistent with the legal-person theory. Dean Ames in drafting an act on the legal-person theory was consistent when he expressly provided that "actions upon claims in favor of or against the firm must be brought in the firm name." Draft 1, Sec. 5 (4); Draft 2, Sec. 4 (4). The fact that the statute also permits the suit to be brought in the partnership name does not make the statute as a whole consistent with that theory. Why should not the law provide, for purposes of convenience, that persons carrying on business under a common name may be sued under their common name? When they are sued in their common or partnership name, whether judgment should be levied on the separate properties of the partners is a practical question, which should not be decided one way or the other because of any legal fiction. There is much to be said for the provision embodied in the Iowa statute that the judgment shall bind the separate property of those partners only who have appeared or been served with notice. The provisions of this statute, though perhaps more happily expressed, were embodied in the procedural section which was part of the seventh draft of the Uniform Act submitted to the commissioners. The section was omitted in subsequent drafts because of the policy of the commissioners not to embody any procedural provisions in their commercial acts. The court in the case under discussion are apparently convinced that a partnership is a legal entity. Consequently they interpret the words "such members as have appeared" as if they read "such members as have appeared to defend in their personal capacity rather than as agents of the partnership" (p. 704). The remarks are *dicta*, but if practically applied are apparently calculated to do much injustice, as they appear to permit a partner actively to defend a suit against the partnership and yet prevent the judgment being levied on his separate property.

Cross *v.* Burlington Nat. Bank, 17 Kan. 336 (1876). The court applies the well-known principle, that while a partner on entering a firm is not liable for prior debts, yet very slight testimony will be sufficient to prove an assumption by him of those debts. This is in entire accord with the theory on which the Uniform Act is drawn. That the business formerly conducted by one or more persons is now carried on by that same person or persons in association with a person not formerly a co-owner of the business, is a fact. The recognition of the fact, however, does not involve the assumption that the business is conducted by an artificial person. Again, the partner entering an established business should in the words of the court share in its (past) obligation as well as its property and business. Thus Sec. 17 of the Uniform Act changes the existing rule that an incoming partner is not liable for existing debts by providing that "A person admitted as partner into an existing partnership is liable for all the obligations of the partnership arising before his admission, as though he had been a partner when such obligations were incurred except that this liability shall be satisfied only out of partnership property."

Duquesne Distributing Co. *v.* Greenbaum, 135 Ky. 182, 121 S. W. 1026 (1909). The court held that a suit could be maintained against a partnership for a slander uttered by an agent of the firm acting for and under the direction of the partners. What this has to do with the theory of the legal nature of a partnership is not at first easily perceived. Whether an obligation arising out of a tort committed in the course of carrying on a business owned by two or more persons should be regarded as an obligation to be sued on and collected in the same manner as an obligation arising out of a contract

rules pertaining to partnership law which we will proceed to examine, for convenience designating them by number.

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made in the business is an important practical question. If the partners are liable for the torts of their agents, why should not the obligation to pay for the injury be regarded in the same way as any other obligation created in the course of the conduct of the business? To decide the question in the affirmative it is not necessary to affirm or deny either that a partnership is a legal person or that it is an association of persons each having a distinct legal personality. The court in the case under discussion took the position that two persons cannot be sued jointly for the same slander, on the ground that the words of one are not the words of the other. The court admits that one man can be sued for a slander uttered at his direction by his agent. Why then, when an agent acts by direction of two, the two principals cannot be sued jointly is not clear. Having, however, created an unnecessary difficulty by taking the position that an agent cannot in committing the act of slander act for two jointly, they escape from the difficulty by the fiction that the slanderer in the case before them did not act at the direction of the partners, which was the actual fact, but by the direction of a fictitious legal person.

Woodman *v.* Boothby, 66 Me. 389 (1876). I have shown in the text that this case does not involve the assumption that a partnership is a legal person. See page 187.

Robertson *v.* Corsett, 39 Mich. 777 (1878). A. and B. owned undivided interests in land. They entered into business with C., the business having the use of the land. A. mortgaged his undivided interest in the land to D., the mortgage merely describing the land by metes and bounds. The issue in the case was whether certain machinery put in to carry on the business was so far attached to the premises as to become a part of it, and therefore included in the mortgage, or whether it remained partnership property. The court decided that this was a question of fact depending on the intent of the parties. In deciding that some of the machinery was not covered by the mortgage it was not necessary to decide that the partnership was a legal person. Had the business been conducted by A. alone, the question whether the intent was to mortgage the machinery would have been essentially the same — namely, was the machinery merely there for the purposes of the business, or was it so identified with the land as to be a part of it?

Clarke *v.* Laird, 60 Mo. App. 289 (1895). A., B., and C. were members of one firm; A. and B. of another. The second firm sold and delivered goods to the first firm. Creditors of the second firm had the goods attached and seized. Held in an action of replevin that the attachment and seizure were unlawful. The same result would be reached under the Uniform Act. Sec. 25 (2*c*) declares that "A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." The existence of two partnerships is a fact. Each association had its property. There was no reason why goods used by A. and B. in the first business should not become part of the stock of the business of A., B., and C. if the parties so desired. The transfer having been effected, it is proper to speak of the goods as the property of the first partnership. The creditors in the attachment were not creditors of that partnership. To recognize two businesses conducted in part by the same persons as being two distinct businesses carried on by distinct associations is to recognize a fact. As pointed out in the text, page 161, the recognition of this fact is a very different thing from saying that each partnership is a separate legal person.

Clay *v.* Douglas County, 88 Neb. 363, 129 N. W. 548 (1911). A statute provided that "The property of banks or bankers, or other companies, and merchants . . . shall

First. "A creditor holding a security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm." [27]

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be listed and taxed in the county . . . where the business is done." A. *et al.*, all non-residents of the state, were partners. They maintained an office in Omaha, B. being the resident agent. B., acting for the partnership, loaned money on notes. The notes were made payable in Chicago, and were kept in the partnership office in that city, but as a matter of fact payment was made to B. in Omaha. The question at issue was whether the credits represented by these notes were taxable in Nebraska. It is clear that as the state had a right to tax these credits, the decision of the question depended on the wording of the state statutes. The court held that the partnership was subject to taxation on these credits although they intimated that had the notes been owned by a non-resident natural person such natural person might escape taxation (p. 366). This conclusion is reached on the ground that a partnership is an artificial person and that an artificial person has a residence wherever it has a place of business. It is submitted that to impose a tax on property owned by non-residents who happen to be associated in business, which would not be imposed if the business was owned by one person, the statutes of the state imposing no special rules in regard to the taxation of credits owned by partnerships, is an arbitrary and unjust result. This unjust result would never have been reached had it not been for the legal fiction of the partnership as a separate legal person.

Curtis *v.* Hollingshead, 2 Green (N. J. L.) 402 (1834). The question at issue was whether under the Attachment Act a creditor of a firm can sue out an attachment against a non-resident or against an absconding partner if the other partners reside in the state. This question the court, in an elaborate opinion, decided in the negative. At the end of this opinion they answered an argument of counsel to the effect that "each partner is a debtor, and his interest in partnership effects, at least after the debts of the firm are paid, is his separate property, and therefore liable to be attached," by saying that each partner is not a debtor to the whole amount of the partnership debt, because "a partnership is considered in law as an artificial person" (pp. 409, 410). The Act under discussion treated joint debtors and partners in the same manner. N. J. REV. LAWS, 1800, p. 366, ACT, March 8, 1798 (Sec. XXVII). If the only reason for not allowing the attachment in this case was the theory that the debts of a partnership are not the debts of the partner but of a fictitious legal person, then the decision, without any warrant from the wording of the Act, produces the following results: When two joint debtors not partners own in common property, and one leaves the state, the creditor may attach the property held in common; but if the debt is contracted in the course of their partnership business by the same persons, and one leaves the state, property held for the purposes of the business cannot be attached. Ingenuity in the shape of a legal fiction of an artificial partnership legal person is responsible for this anomalous result.

Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699 (1892). A. *et al.* were partners. They were insolvent; they were indebted to C. B. was admitted as partner, not contributing any capital. E. *et al.* extended credit to the partnership after B.'s admission. The partnership assigned to T. for the benefit of creditors, directing that C. be paid first out of the assets. E. *et al.* attacked this preference, on the ground that C. was not a

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[27] This and the other legal rules cited by Mr. Crane in support of the second statement will be found in 28 HARV. L. REV. 767, 768.

Under the Bankruptcy Act if a creditor holds property of the bankrupt as security, he must sell it and prove only for the balance,

creditor of the firm that assigned. The court sustained the preference on the ground that the property of the old firm on B.'s admission became the property of the new firm, and that under the facts of the case it was the understanding of B. and his partners that the debt to C. was assumed by the new firm. As pointed out in connection with Cross *v.* Burlington Nat. Bank, 17 Kan. 336 (1876), under the Uniform Act the same result would be reached without the necessity of proving that the incoming partner had agreed to pay the existing debts of the business, an assumption which even in this case is somewhat strained when we remember that we not only have to assume that the incoming partner agreed to permit the property in the business to be applied to the payment of existing debts, which is a natural assumption, but that we also assume that he agreed that his separate property could be taken for that purpose. Section 17 of the Uniform Act, as stated, makes the incoming partner liable for existing debts, but provides that this liability shall be satisfied only out of partnership property. Again, Sec. 41 (1) provides that "When any new partner is admitted into an existing partnership . . . if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business"; thus, as pointed out, producing the exact result reached by the court. Although in this case the court does not even reach its conclusion on the ground that a partnership is a legal person, they do explain that the reason why the separate creditors of a partner have only the debtor partner's rights in the profits after partnership creditors are paid is that "the *corpus* of firm property belongs to the firm as an entity" (p. 604). As pointed out in the text (see page 173), the provisions of Sec. 25 of the Uniform Act reach the same result, not by the assumption of a partnership legal person, but by giving the partner's right as cotenant in specific partnership property the legal incident of being assignable only in connection with the assignment of the rights of all the partners.

Clarke *v.* Slate Valley R. R. Co., 136 Pa. St. 408, 20 Atl. 562 (1890). In this case the court declared that ordinarily the majority of the partners have a right to select an attorney to prosecute a partnership claim. It is hardly necessary to point out that the legal-person theory of partnership is not necessary to the decision. Under any theory of the nature of a partnership, the real issue in such a case is whether the act is one which, in view of "the manner in which the business of a firm must be conducted" (p. 414), the majority of the partners, even against a protesting minority, should be allowed to do. To discuss the abstract question whether a partnership is a legal person separate from the partners tends, in this as in all similar cases, to cloud the real issue, by withdrawing the mind from the necessity of looking at the facts of partnership business and the way in which it can practically be conducted.

Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83 (1888). A. and B., partners, made an assignment of all their partnership property for the benefit of partnership creditors. They each had a small amount of separate property and separate creditors. After the assignment, D., a partnership creditor, secured a judgment and attempted to obtain a prior lien on the sum realized by the assignee from the sale of the property. The lower court permitted this, one of the grounds being that the assignment was void as a partial assignment in that it did not include the individual property of the partners. Two of the three judges, while not affirming that a partial assignment for the benefit of creditors is always void, answer the objection to the assignment by saying that "a co-partnership is a distinct entity, entirely separate from that of any of its

or he must surrender the security. On the other hand, if he holds as security for his claim against the bankrupt, property of a third

members" (p. 526). They also point out that the assignment was openly made, and that if there was individual property of the partners, the assignment left it, as before, liable to creditors. The assignee on the payment of the partnership creditors in full was, by the terms of the assignment, to return the surplus to the partners. It is submitted that this provision of the assignment raises the real issue in the case, which is whether the assignment was a hindrance to the creditors of the assignors not included in its terms. This can only be ascertained by the answer to the inquiry: What are the rights of the separate creditors in partnership property? To this inquiry both the legal-person theory and the provisions of the Uniform Act give the same answer. Under the legal-person theory, until all the partnership debts are paid, and the surplus divided among the partners, the separate creditors cannot attach partnership property. All they can do is to attach the partner's interest in the partnership. Under the Uniform Act there is precisely the same result. Sec. 25 (2c) provides that the partner's right as co-owner of specific partnership property is not subject to attachment or execution on the claims of separate creditors, and under Sec. 28 (1) his interest in the partnership may be attached (charged) by any separate creditor.

Good *v.* Jarrard, 93 S. C. 229, 76 S. E. 698 (1912). A., the owner of land on which was a house, leased the premises to B. and C., partners, for the purpose of their business, the lessees taking possession. Before the expiration of the lease, B. entered into an executory contract for the purchase of the property, the money to be paid on the delivery of an unencumbered title. Prior to the execution of the contract, and while B. and C. were in possession under the lease, the house burnt down. The court decided that the loss should fall on the vendor. They refer to the fact that the vendor was still exercising the rights of owner, and in this connection assert that B. "was not in possession as vendee, but in his representative capacity as a firm, which is a distinct entity from the members of the firm, in their capacity as individuals" (pp. 236, 237). It is manifest, however, that the legal-person theory to which the court gives adherence is not necessary to the conclusion. Even if we assume that the court would have held that the loss falls on the vendee when he is in possession, that possession would have to be possession as owner under the contract of sale; and whether we regard B.'s possession as the possession of an agent for a legal partnership person, or for himself and C. as partners in a particular business, he certainly was not in possession as owner under the contract.

Pierce's Adm'r *v.* Trigg's Heirs, 10 Leigh (Va.) 406 (1839). The legal title to certain real property, bought with partnership funds, was held in the names of the two partners. One died leaving infant heirs. The survivor brought a bill against the heirs compelling a sale for the benefit of the partnership. On the heirs attaining their majorities they attacked this sale. The court applied the rule that, though title to partnership real estate held in the name of a partner passes to his heirs, the beneficial interest passes to the surviving partner or partners. They, therefore, sustained the former decree. The result under the Uniform Act would, of course, be the same. Section 8 provides that "All property . . . acquired by purchase or otherwise on account of the partnership is partnership property." One of the judges who delivered an opinion in the case asserts that the partners during their lives held the legal title in trust, not for themselves as individuals, but for the partnership as an artificial person (p. 423). It is hardly necessary to point out, however, that the conclusion, which is that the property could be sold on the death of one partner by the survivor for the

person, he can obtain a dividend on the full amount of his claim from the bankrupt's estate and also retain the property of the third person to the extent required to pay his claim in full. It will be noted that the only difference in the facts of the two cases is that in the first case the creditor is using property which would otherwise go to the creditors generally, and in the second case he is not. This difference in the facts justifies the difference in the rules. Now under the Bankruptcy Act the partnership creditors have priority in the partnership assets, the separate creditors of the partners priority in the separate assets. Does the partnership creditor who holds as security the separate property of a partner stand in the same position as a creditor who holds what is known as "outside security," that is, property of a third person? To this question the facts compel an affirmative answer. He does in so far as he is a claimant on the partnership funds. Therefore the courts have treated the partnership creditors holding the separate property of the partner as security as holding "outside security." This is not, however, because they have unconsciously adopted the theory that the partner and the partnership are distinct legal persons. It is because each class of the partner's creditors, the partnership and separate creditors, have priority on the joint and separate assets respectively; and therefore the partnership creditor does not take any of the property out of which he or his fellow partnership creditors are claiming dividends when he uses the security which he has received from the separate estate of the partner. There is, therefore, no more reason why the dividend out of partnership assets should be reduced if he retains such security than if he retains security received from a third person. The result is the same as it would be if the partnership were a distinct legal person; but that is a very different thing from saying that the result involves the unconscious recognition of the partnership as a distinct legal person. After the partnership creditors have exhausted the joint estate, and turn to the surplus, if any, of the separate estate of the partner, then it is a question whether the fact

benefit of the partnership, can also be reached on the theory of the Uniform Act, which is that the partners hold the partnership property with the understanding that it shall be applied to partnership purposes before being applied to any purpose not connected with their mutual enterprise, and that on the death of a partner the survivors shall have a right to take the property and sell it for the purpose of winding up partnership affairs.

that the partnership creditor has already used the separate property of the partner to pay in part his claim should or should not reduce the amount for which he could otherwise claim. The determination of this last point does not involve any question of the recognition of the partnership as a legal person, but how far it is practically advisable to permit one partnership creditor to secure an advantage over other partnership creditors by his diligence in obtaining the separate property of a partner as security for his claim.

In connection with the foregoing discussion we may note one of the fundamental difficulties with the theory that a partnership, while not a natural, is a legal person. It forces us to decide the question at issue, in this case, whether the security is "outside security" — not because of the practical reason that the partnership creditor is using property which would in any event not go to swell the dividends which he and creditors of his class would receive out of partnership property, but because of a legal fiction that a partnership is a person.

Second. "Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the joint estate."

As already pointed out in another connection, just as a man may engage in two distinct businesses, which are distinct because as a matter of fact he keeps them separate, so two or more persons may engage jointly in two or more distinct businesses. Suppose A. and B. jointly engage in two distinct businesses. They become insolvent. Should or should not the properties used in both businesses be regarded as a single fund, or should they be kept separate and distinct, and the property devoted to each business first applied to the payment of the creditors who have extended their credits in transactions connected with that business? Here again we have a purely practical question: Shall the law in the distribution of the joint assets follow the partners themselves in keeping their joint assets devoted to each particular business distinct, or shall the law throw all joint assets into one fund and give all joint creditors an equal claim on that fund? The writer's belief that the courts have correctly decided this question is strengthened by the fact that in arriving at their conclusion they have apparently looked at the facts as they are, and that therefore their decision is not due to the mechanical application of a legal fiction.

Third. "When a firm signs a note as co-makers with an individual the liability of the firm is that of one person for purposes of contribution."

Perhaps a better way to state the rule without assuming the point at issue, which is whether the rule unconsciously assumes that the partnership is a legal person, would be to say, that for the purpose of contribution the liability of the firm is no greater than the liability of the individual.

The facts stated show a situation in which partners as a partnership group take part in a transaction with one or more persons acting separately. Suppose A., B., and C. are desirous of obtaining money on a note. B. and C. are partners. The three agree that they will sign the note "A.," and "B. and C. partners." Unless there is other evidence rebutting the inference, it is hardly possible to assume that the parties to the transaction did not intend to contribute toward the payment of the note, one half by A. and one half by B. and C.; and furthermore they have indicated that the act of B. and C. in signing the note was a transaction in their business as partners. To say, therefore, that for purposes of contribution the liability of the partnership is the same as A.'s liability is only to carry out the apparent intention. The legal-person theory of partnership is not necessary to the result.

Fourth. "A bill bearing the names of two firms engaged in two distinct activities, but composed of the same members, is signed by two persons."

Mr. Crane cites one case only, *Second National Bank* v. *Burt*,[28] in support of the proposition. That was an action brought by a bank against a former cashier to recover damages because of loss due to the defendant's negligence, one of the grounds being that acting for the bank he had discounted certain bills in violation of a section of the by-laws which provided: "To entitle any paper to be discounted, there must be two names of responsible persons liable upon the same . . . the name of a firm being considered one person." [29] The bills in question were drawn by one firm on another, both firms being composed of the same persons. The court held, that even if the defendant knew that the firms were composed of the same individuals, "he was justified in supposing that they

[28] 93 N. Y. 233 (1883).

[29] *Ibid.*, p. 239.

constituted two firms." [30] This conclusion no more involves the assumption that each firm was a distinct legal person than the wording of the by-law. Two or more persons as a matter of fact carry on in association two distinct lines of activity; that is, form two distinct associations or partnerships. In view of the wording of the by-law the conclusion reached by the court was unavoidable. They were two distinct partnerships; but as already pointed out in another connection, it does not follow that the court's recognition of that fact involves their recognition as a logical necessity of the legal theory that the business of each association was carried on by the partners as agents of two distinct legal personalities.

Fifth. "A promissory note given by a firm to a partner or *vice versa*, or by one firm to another having a common member, is not enforceable at law by the original parties because of procedural difficulties, as the same person cannot be both plaintiff and defendant. But the contract is valid and may be enforced if the procedural difficulty is removed, as by an assignment to a third person, even for the benefit of the assignee. So in the case of a balance of account due from the firm to a partner. A promissory note given by a firm to a partner may be enforced, though transferred after maturity, retransferred, and again negotiated after maturity, when it would be extinguished if the firm was not personified."

The writer treats all these rules and illustrations together because he thinks that we shall find that their use by Mr. Crane to indicate an unconscious adoption of the legal-person theory is in each case due to the same mistake on his part. A close examination of his language is necessary to show why he regards the rules given as illustrations of the unconscious personification of the partnership. Indeed one statement, namely, that a promissory note given by a firm to a partner or *vice versa* cannot be enforced by the original parties to it, because the same person cannot be both plaintiff and defendant, is a distinct recognition that the partnership is an aggregate of persons and not an artificial legal person of which the partners are agents. He does, however, point out that the contract represented by the note is not void and may be enforced if the note is assigned to a third person and the proced-

[30] 93 N. Y. 233, 244 (1883).

ural difficulty removed. It therefore is apparent that recognition of the validity of the contract between the partner and the partnership is that which he regards as the unconscious assumption that a partnership is a legal person. Why this recognition of the validity of the contract should involve such an assumption is not clear. Surely Mr. Crane does not contend that a person cannot be interested on both sides of a contract. Take a case involving such a note as he describes. A., B., and C. are partners. A. holds as payee a note executed in the partnership name. This on its face indicates that A., B., and C. have agreed that on a day certain, or on demand, A. shall be paid a sum of money out of partnership funds, or failing such funds, B. and C. will pay A. their share as partners. The form of the obligation shows that it is understood that A. has a right to assign it to a third person, and that if he does so it will be treated as any other partnership debt. Until he assigns A. is unquestionably interested on both sides of the contract. The dual interest is a fact, not a legal theory. Again Mr. Crane can hardly contend that, unless by a fiction we call the partnership a legal person, the fact of A.'s interest on both sides of the contract makes the contract illegal. There is nothing illegal about the transaction just given or any similar transaction. As Mr. Crane himself points out, the reason A. cannot as payee enforce it is purely procedural. There is no reason in morals why A. should not enforce the note unless by so doing he competes with his own partnership creditors.

The situation arising when the partner to whom the note is payable assigns to a third person is exactly stated by Chief Justice Shaw in *Pitcher* v. *Barrows*.[31] Speaking of a note of a partnership composed of five given to a partnership composed of two of the five, he says:

"It was a promise by five to pay to two of their own number on their order, and as an original contract it could not be enforced at law, for the obvious reason that the two promisees could not sue themselves as promisors, and the other three promisors were not liable without them. But this is a difficulty attending the remedy only, not the right; and when the note is endorsed by those having the right to endorse it,

[31] 17 Pick. (Mass.) 361, (1835). See also: Heywood *v.* Wingate, 14 N. H. 73, 78 (1843); Thayer *v.* Buffum, 11 Met. (Mass.) 398, 399 (1846); Woodman *v.* Boothby, 66 Me. 389, 391 (1876).

to one against whom there is no such exception, whereby he acquires a legal interest and right to sue in his own name, the difficulty vanishes." [32]

The last statement of this fifth rule is that a promissory note given by a firm to a partner "negotiated before maturity, retransferred and again negotiated after maturity may be enforced when it would be extinguished if the firm were not personified."

Again it is not clear why Mr. Crane draws this inference, unless we assume that he either believes that a person cannot be interested on both sides of a contract, or that when he is the contract is always illegal except where the illegality is overcome by a fiction: one alternative being false in fact, the other having no foundation either in morals or law. Had, therefore, the authorities cited by Mr. Crane supported his statement, it would not, any more than the other illustrations, prove that the partnership was personified. But the only case cited in support of the text is *Woodman* v. *Boothby*.[33] This was a case in which a note was given, not by a firm to a partner, but by a partner to a firm. One Boothby placed his name on the back of the note in blank. The note was then negotiated. The maker not paying at maturity, the other members of the partnership paid the note, presumably either out of separate or firm funds, and then again negotiated it. The court decided

[32] 17 Pick. (Mass.) 363.

[33] 66 Me. 389 (1876). After the citation is: "But see Easton *v.* Strother & Conklin, 57 Ia. 506, 10 N. W. 877 (1881); Deavenport Co. *v.* Green River Dep. Bank, 138 Ky. 352, 128 S. W. 88 (1910)." In neither of these was a note given by a firm to a partner. Easton *v.* Strother & Conklin stands for the proposition that a partner cannot by purchase become the owner of an outstanding note payable by the partnership, and Deavenport Co. *v.* Green holds that one of two obligors on a note cannot purchase it, citing Gardner *v.* Salyer, 1 Ky. L. Rep. 420 (1880), for the statement that "When a firm note comes into the hands of an individual member of the firm by assignment, this operates as an extinguishment of the note, and his assignee will take nothing by such an assignment. He cannot sue upon the note, and he can pass no such right to another" (p. 356). See apparently *contra*, Kipp *v.* McChesney, 66 Ill. 460 (1872). The rule which prevents a partner from doing anything with firm paper held by a third person except pay it is in accord with the sound policy of preventing a debtor speculating with his own debts, although the decisions supporting the rule, as Mr. Crane apparently recognizes, are not easily reconciled with the theory that the debts of the partnership are not the debts of the partners, but rather the debts of a partnership legal person. The absurd assumption that a partnership can be bankrupt, although there are one or more solvent partners, is due to the fact that some of the sections of the Bankruptcy Act lend color to the assertion that it proceeds on the legal-person theory. See *In re* Bertenshaw, 19 Am. B. R. 577, 588 (1907).

that the holder could recover from Boothby, as a joint maker, thus applying the rule in Maine prior to the adoption of the Uniform Negotiable Instruments Act, that an anomalous indorser is a joint maker. When the partnership as indorsers paid the indorsees, if the only reason they could not sue the partner and Boothby at common law was procedural, this reason did not bar their subsequent assignee. If, on the other hand, the note was made by the partner to enable money to be raised for the partnership, there being no intention that the partner should pay the sum mentioned on the face of the note into the partnership funds, then both the partner and Boothby as joint makers had an equitable defense to any claim of the partnership, and this claim could be set up against an assignee of the note who took it after maturity. The court decided that the note was not given for the accommodation of the firm, but for a debt due by the partner to the firm.

It is interesting to note that the court in its opinion shows the confusion of thought which the idea of a partnership as a fictitious person tends to produce. It points out in one paragraph the fact that while the note was held by the firm no action could be brought on it, a conclusion which is necessarily based on the assumption that a partnership is an aggregation of persons and not a legal person, distinct from the partners, and then in the very next sentence it asserts that "a firm is to be regarded as a distinct personality" as a reason for regarding a note given by a firm to a partner as valid.

Sixth. "A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt."

Mr. Crane cites cases for and against this proposition. It may, however, be doubted whether there is any real conflict. The question in each case should depend on the intent of the parties to the transaction. If that intent is not formally expressed in words all the circumstances should be taken into consideration. These circumstances might in one case indicate that by "any sum for which he became indebted" sums for which he became indebted as a partner were intended; while in another case the circumstances would compel an opposite conclusion. The legal-person theory of partnership would compel the conclusion in every case of this

class that partnership debts are excluded. Thus, as in other cases, the theory would prevent the court from ascertaining the intent of the parties from the facts.

Seventh. "Two firms consisting in part of the same members are joined in insolvency proceedings. A non-resident creditor who has proceeded against one is not barred thereby from later seeking to enforce a claim against the other."

A single case, *Pattee* v. *Paige*,[34] is cited for the proposition, and that seems to have been decided by a majority of the court only. It is difficult to understand how the affairs of one partnership could have been settled without ascertaining the value of the interest of the partners, who were members of the other partnership, in that other partnership by winding up its affairs.[35] It has been found impractical to settle affairs of a partnership without at the same time settling the separate affairs of the partners, for the reason that the partnership creditors have a right to be paid out of the separate assets of the partners after their separate creditors are satisfied. To insist that a non-resident who proves his claim against one partnership should also prove his claim against the other partnership included in the same insolvency proceedings or have his claim against the second partnership barred, would not on its face be an injustice to such non-resident. This is said without any intention to criticise the conclusion reached by the court in the case cited. In any event, however, the recognition that there are two distinct businesses, one run by A. and B. and the other by A., B., and C., which is all that is involved in the court's decision, is a recognition of a patent fact, which, as has been already pointed out, does not involve the necessity of saying that each business is conducted by a legal personality distinct from the legal personalities of the partners.

Eighth. "One partnership having joined with natural persons to form a second partnership, and both being insolvent, the assets of the first partnership are to be applied to the payment of its own debts, then to the payment of those of the second partnership of which it was a member."

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[34] 163 Mass. 352, 40 N. E. 108 (1895).

[35] The difficulties of attempting to put a partnership into bankruptcy without settling at the same time the separate affairs of the partners are familiar to the profession.

Here again Mr. Crane's use of this rule as an example of unconscious adoption of the legal-person theory of partnership shows a failure to perceive that the recognition of the fact that a partnership is a group of persons acting together for a definite purpose, with activities as partners distinct from their activities not connected with the partnership, does not necessarily involve the assumption that the partners, when carrying on the partnership, are in law acting as "a distinct legal personality." Let us look at what actually takes place in a case illustrating the rule. A., B., and C. are in partnership. They join with D. to form a new partnership. Their understanding is that the act of A., B., and C. in joining in the second contract is an act which they do jointly as partners in the first partnership, and that the second business is distinct from the first. As A., B., and C. regard their act in joining the second partnership as an act which they do jointly as partners in the first partnership, they impliedly agree among themselves that their obligations as partners in the second partnership to make good any deficiency of partnership assets is an obligation to which the property of the first partnership will be devoted before any division is made of the property among themselves. In the rule given by Mr. Crane the first partnership has apparently more than enough to pay all its obligations except its obligations to make good a deficiency of assets of the second enterprise. It is in accord with the understanding of the parties that the property of the first partnership should be used first to settle the debts contracted directly in the carrying on of its business, and that the surplus should be devoted to pay the joint obligation of A., B., and C. to make good any deficiency in the property of the second partnership. The case cited by Mr. Crane in support of his illustration [36] merely applied to the understanding between the parties the principles of equity and of the Bankruptcy Act, that partnership creditors should be paid first out of partnership assets. It is true that the result is not in conflict with the theory that a partnership is a legal person; but it no more necessarily involves the assumption that a partnership is a legal person than any other application of the rule that partnership creditors should be first paid out of partnership assets involves such assumption.

[36] *In re* Knowlton & Co., 196 Fed. 837 (1912).

Ninth. "A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm."

I have already dealt with the subject of this illustration in dealing with Section 25 of the Uniform Act and the rights of a partner in specific partnership property.[37] As explained, the rule does not necessarily involve the conception that partnership property is owned by a legal person distinct from the partners. It is equally in accord with the theory on which the Uniform Act is drawn, namely, that the partners are co-owners of partnership property holding as tenants in partnership, an incident of this tenure being that a right of possession for a non-partnership purpose, or the right of assignment apart from the collective assignment of the rights of all the parties, does not exist. In some jurisdictions the sheriff is not subject to an action of trespass;[38] but he ought to be, because as representative of the separate judgment creditor of a partner he is using partnership property for a non-partnership purpose, something which the partner has no right to do.

This completes our examination of all the illustrations of the unconscious adoption by the courts of the theory that a partnership is a separate legal person. None of them necessarily involves that view of the nature of a partnership. They are no more than illustrations of the obvious fact that the activities of the partners as associated in partnership form a group of activities separate from their other activities.

Mr. Crane's third statement is that legislators having occasion to deal with the partnership incidentally, naturally treat it as a legal person.[39] In proof of this assertion he cites acts which allow a firm to sue or be sued in a firm name, or which require property to be listed for the purposes of taxation in a firm name, or which penalize a partnership as such for breaches of the Fish and Game or Anti-Trust Laws. But the habit of speaking of any association by the name the members apply to it is not proof that they or we regard the association as a distinct legal personality. It is therefore somewhat puzzling to understand why anyone should regard a right conferred by statute on the associates to sue or be sued in matters arising out of their common business in the name in which,

[37] *Supra*, p. 173. [38] BURDICK, PARTNERSHIP, 273.
[39] 28 HARV. L. REV. 768–769.

for purposes of convenience, they carry on that business, as conclusive proof that those who voted for the statute treated the association as a distinct legal person. Neither is it easy to see why we must draw a similar conclusion from a statutory requirement that for purposes of taxation property used for the common purpose must be listed in the common name. So with the provisions of the Fish and Game or Anti-Trust Laws. In case a crime is committed by the partners in furtherance of their partnership business, the provisions of the statutes rightly make the money claim of the state, which is the punishment for the crime, a claim against the partners as organized to carry on partnership business. This is a recognition of a fact — the fact that the crime is committed in the carrying on of the common or partnership business. So a tort committed in the carrying on of the partnership business creates a similar claim in the person injured, and yet even Mr. Crane does not argue that this is any proof that the partnership is therefore considered a legal person. Thus Mr. Crane's examples given to support his statement that legislators "naturally treat a partnership as a legal person," like his illustrations to prove his statements tending to show the tendency of the courts to adopt the legal-person theory, are no more than illustrations of the fact that partners as associated in partnership carry on a group of activities which are separate from their other activities.

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(To be continued)

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